Supreme Court U.S.
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No. 01-1526

In the Supreme Court of the United States

ROBERT E. BROWN,

Petitioner,

v.

CITY OF WILMINGTON, JIM SILLS, MAYOR, DELDOT, CITY COUNCIL FOR THE CITY OF WILMINGTON, CITY PLANNING DEPT. AND MBNA BANK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MBNA BANK BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition raises the following issues[1]:

1. Did the United States Court of Appeals for the Third Circuit err in ruling that the District Court Judge should not have *sua sponte* recused himself pursuant to 28 U.S.C. §§ 144 and 455?

2. Did the Third Circuit err in affirming the District Court's grant of Respondents' Motions to Dismiss for failure to state a claim based upon any deprivation of Petitioner's constitutional rights?

[1] Petitioner Robert E. Brown does not list as a question for review to this Court the alleged constitutional deprivations which formed the substantive basis of Petitioner's Complaint in the United States District Court for the District of Delaware. However, he argues this issue in his Petition under the subheading, "Reasons for Granting the Writ" (See Petition at p. 7). Therefore, Respondent MBNA Bank ("MBNA") will address that issue.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, there was a second Plaintiff in the original proceedings in United States District Court for the District of Delaware and on appeal to the United States Court of Appeals for the Third Circuit. The Third Circuit dismissed Micro Business Community for failure to timely prosecute. (Pet. App. at p. 8a).

Also, the District Court dismissed the complaint against Defendant DELDOT without prejudice for ineffective service of process. (Pet. App. at p. 7a). The Third Circuit affirmed the District Court's decision to dismiss DELDOT. (Pet. App. at pp. 36a-37a).

Respondent MBNA Bank ("MBNA"), whose proper name is MBNA America Bank, N.A., is a wholly-owned subsidiary of MBNA Corporation, a publicly traded company. Additionally, Alliance Capital Management L.P. ("Alliance") and certain affiliates of Alliance (together with their parent corporations AXA Financial, Inc., formerly known as the Equitable Companies Incorporated, AXA and certain AXA affiliates) hold 10% or more of the party's stock.

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STATEMENT OF THE CASE

Petitioner Robert Brown brought an action against the City of Wilmington, City Council, Planning Department and Mayor (collectively the "City"), the Delaware Department of Transportation ("DELDOT") and MBNA in United States District Court for the District of Delaware. (Pet. App. at p. 3a). This action was brought pursuant to 28 U.S.C. §1343 and 42 U.S.C. §§ 1983, 1985 and 2000a. (Pet. App. at pp. 4a-5a). Petitioner alleged that Defendants, individually or collectively, had repealed a municipal ordinance on July 8, 1993, which resulted in the elimination of parking meters along certain streets in downtown Wilmington. Petitioner owns a business along one of the streets. Petitioner claimed that Respondent MBNA took part in efforts to repeal this ordinance in order to build its downtown headquarters. (Pet. App. at p. 4a). Petitioner alleged that this action violated his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Respondents MBNA and the City filed motions to dismiss, claiming *inter alia* that Petitioner had failed to state a claim upon which relief may be granted. Petitioner Brown moved for a default judgment against DELDOT. (Pet. App. at p. 4a).

The United States District Court for the District of Delaware granted Respondents MBNA and the City's Motions to Dismiss, finding that Petitioner had failed to state a claim under 42 U.S.C. §§ 1983 and 1985 because there was no constitutional deprivation occasioned by the removal of parking meters along public city streets. Moreover, Petitioner failed to state a claim under 42 U.S.C. § 2000a because he did not allege that he was denied access to public

accommodations on the basis of race, color, religion or national origin.[2] (Pet. App. at pp. 6a-7a).

The Court denied Petitioner's motion for default judgment against DELDOT, ruling that service of process was ineffective. (Pet. App. at pp. 5a-5b).

Petitioner appealed the District Court's decision to the Third Circuit Court of Appeals. In this appeal, Petitioner argued for the first time that the district judge should have recused himself *sua sponte* under 28 U.S.C. §§ 144 and 455. Petitioner claimed that the judge was biased because he was presiding over a separate case involving Respondent MBNA and its counsel, and that the judge had at one time acted as counsel for the Delaware Public Service Commission at the same time one of MBNA's counsel had served as Attorney General for the State of Delaware. (Pet. App. at p. 35a-36a). Petitioner also argued that the District Court had erred in its ruling with respect to his substantive claims.

The Third Circuit rejected both arguments. (Pet. App. at pp. 36a-37a). Petitioner moved for reargument. The Third Circuit denied this motion. (Pet. App. at pp. 38a-39a). Petitioner has filed a petition for writ of certiorari to this Court. This is Respondent MBNA's brief in opposition.

[2] Petitioner alleged violations of state law as well. The District Court rejected those claims.

REASONS FOR DENYING THE WRIT

I. RESPONDENT BROWN HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

Certiorari review is a matter of judicial discretion, to be granted only for compelling reasons. Sup. Ct. R. 10. Although not exhaustive, Supreme Court Rule 10 lists the following pertinent reasons the Court typically considers: the United States Court of Appeals has decided a matter in conflict with the decision of another United States Court of Appeals on an important issue; or has so far departed from the proper procedure as to call for this Court to exercise supervisory authority.Petitioner has not demonstrated any compelling reason for this Court to exercise its discretion in this case.

A. There is No Conflict of Authority Between Courts of Appeal on any Matter Raised by Petitioner

Regarding the recusal issue, Petitioner alleges that the Third Circuit's opinion in this case conflicts with the United States Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994) and the decision of *Bernofsky v. Tulane University Medical School*, 962 F.Supp. 895 (E.D. La. 1997). *Bernofsky* is a District Court decision. Regardless, neither decision conflicts with the Third Circuit's ruling in this case. As the Third Circuit observed, Petitioner's argument for recusal is "frivolous." (Pet. App. at p. 35a). Petitioner raised the allegation of judicial bias for the first time on appeal. He did not follow the requirement of 28 U.S.C. § 144 that an affidavit be filed with the District Court stating the reasons

why the judge was biased. (Pet. App. at p. 35a). Moreover, with respect to 28 U.S.C. § 455, a judge is required to recuse himself only when his impartiality might reasonably be questioned. *United States v. Martorano*, 866 F.2d 62, 67 n. 5 (3d Cir. 1989). The grounds cited by Petitioner do not meet that standard.

First, Petitioner claims that the judge who presided over his case simultaneously presided over another matter including Respondent MBNA and its counsel. The mere participation by a judge in two cases involving the same party does not, in and of itself, call the judge's impartiality into question. *See, e.g., Christo v. Padgett*, 223 F.3d 1324, 1334 (11th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001); *Sine v. Local No. 992 International Brotherhood of Teamsters*, 882 F.2d 913 (4th Cir. 1989).

The Third Circuit's ruling in this regard does not conflict with any decision cited by Petitioner. In *Liteky v. United States*, 510 U.S. 540 (1994), this Court clarified the meaning of the "extrajudicial source" doctrine and its application to § 455 cases. Nowhere does that opinion state a proposition contrary to the Third Circuit's reasoning in this case. The District Court's decision in *Bernofsky v. Tulane University Medical School*, 962 F.Supp. 895 (E.D. La. 1997) is simply inapposite to any recusal issue Petitioner has raised. Second, the district judge's former association with one of Respondent MBNA's counsel several years prior to the instant case, even if true, would not under the circumstances disqualify the judge from hearing this case. *See Bumpus v. Uniroyal Tire Co. Division of Uniroyal, Inc.*, 385 F. Supp. 711, 714 (E.D. Pa. 1974); *Hauptmann v. Wilentz*, 555 F.Supp. 28, 31 (D.N.J. 1982). Logically, no inference can be drawn from a judge's former representation of the Public Service Commission and the subsequent appearance before

that judge of the former Attorney General of the State of Delaware. This relationship does not implicate any of the specific statutory prohibitions set forth in 28 U.S.C. § 455(b). The Third Circuit did not specifically address this second argument for recusal, but the result would be the same as with the first. Petitioner has cited no conflicting authority warranting this Court's review on that issue.

B. There is No Conflict of Authority Between Courts of Appeal Concerning Petitioner's Constitutional Claims

The Third Circuit ruled there was no violation of Petitioner's federal rights to due process and equal protection. First, Petitioner Brown failed to state a claim for deprivation of due process because he had no liberty or property interest in either the parking meters or in public parking. (Pet. App. at p. 37a). Petitioner had not made out an equal protection claim because he did not allege invidious discrimination or any classification scheme. (Pet. App. at p. 37a).

This decision does not conflict with any other Circuits. Indeed, Petitioner has not cited any such conflict. Accordingly, there is no merit to Petitioner's request that this Court exercise discretion to grant a writ of certiorari on this ground.

II. THE LOWER COURTS DID NOT ERR IN DENYING PETITIONER'S CLAIMS

Both the District Court and the Third Circuit Court of Appeals correctly ruled that Petitioner suffered no constitutional deprivation as a result of the removal of parking meters on City streets. As mentioned above, in order to state a claim for relief under 42 U.S.C. §§ 1983 and 1985,

Petitioner must allege denial of a constitutional right. The streets and parking meters in the City are public property. Therefore, there is no claim that private property was taken for public use without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. (Pet. App. at pp. 6a, 37a). Moreover, Petitioner has no equal protection claim because he did not allege either invidious discrimination or any classification scheme. (Pet. App. at p. 37a). Nor was there a violation of 42 U.S.C. § 2000a, as Petitioner did not allege discrimination on the basis of race, color, religion or national origin in the denial of access to a public accommodation. (Pet. App. at pp. 7a, 37a).

With respect to Petitioner's claim of judicial bias raised for the first time on appeal, the Third Circuit correctly concluded that no actual nor reasonably apparent bias was shown. This claim is clearly without substantive merit. Moreover, given the procedural posture in which judicial bias was raised for the first time on appeal, the Third Circuit was correct in rejecting the claim.

CONCLUSION

The Petition should be denied because no compelling reasons exist for this Court to exercise its discretion.

Dated: May 17, 2002

Respectfully submitted,

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